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No. 83-2168

In The

Supreme Court of the United States

October Term, 1983

RUEL A. GALBREATH

Appellant,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS FILED ON BEHALF OF THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

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RESTATEMENT OF QUESTION PRESENTED

WHETHER A FLORIDA PUBLIC SCHOOL TEACHER WHO IS NOT A UNION MEMBER HAS A FEDERAL CONSTITUTIONAL RIGHT TO COMPEL HIS PUBLIC EMPLOYER OR HIS EXCLUSIVE BARGAINING AGENT TO PROCESS A GRIEVANCE THROUGH BINDING ARBITRATION WHERE THE COLLECTIVE BARGAINING AGREEMENT RESERVES TO THE UNION THE RIGHT TO INVOKE ARBITRATION AND THE UNION, AFTER REPRESENTING THE TEACHER AT THE LOWER LEVELS OF THE GRIEVANCE PROCEDURE, REFUSES TO ARBITRATE BECAUSE THE GRIEVANCE LACKS MERIT?

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Appellee, the SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, respectfully moves, pursuant to Rule 16.1, Rules of the Supreme Court of the United States (1980 Revision), for dismissal of the above-entitled appeal on the grounds hereinafter summarized and argued below:

1. Appellant Galbreath was not affected by and therefore lacks standing to attack the exception set forth in Section 447.401, Florida Statutes (1979), which allows a Florida public sector union the option of requiring a

nonmember to provide his or her own representation in contractual grievances. In this case, Galbreath's union *did* represent him and did not invoke the challenged exception. Accordingly, Galbreath cannot present a justiciable issue for resolution by this Court. Dismissal is also appropriate because Galbreath's alleged injuries (*i.e.*, denial of unauthorized overtime pay, individual access to arbitration and/or administrative hearings on his unfair labor practice charges) would not be redressed *even if* the exception were ruled unconstitutional. The appeal thus seeks no more than an advisory opinion outside the jurisdiction of this Court under Article III of the United States Constitution.

2. Appellant Galbreath has presented no more than a garden variety fair representation claim which should be summarily dismissed for want of a substantial federal question. Although his appeal is framed as a challenge to Section 447.401, Florida Statutes (1979), his true contention is that as a nonmember of the union, he enjoys a state or federal constitutional "right" not to be represented by the union and to proceed individually to arbitration. It was Galbreath who unsuccessfully sought to avoid the union's authority as exclusive bargaining representative by asserting an alleged right to take his own grievance to arbitration with his own legal counsel prior to and after his bargaining agent refused to do so because the claim lacked merit. Thus, Galbreath's true complaint is that his union agreed to and did represent him in connection with his grievance despite his nonmember status. The only way Appellant Galbreath could obtain the relief he requests in this appeal is if this Court were to recede from its express approval of the constitutionality of ex-

clusive representation principles in public sector collective bargaining enunciated in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The appeal should therefore be dismissed.

3. Appellant Galbreath's lack of standing and other reasons provide an independent and wholly adequate nonfederal ground upon which the Florida Supreme Court found "Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit." (Appendix to Jurisdictional Statement at p. 9).[1]

4. Finally, even if he had the requisite standing and had raised a substantial federal question in this Court, Galbreath's appeal should be dismissed because the question was not timely or properly raised in the proceeding below.

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STATEMENT OF PROCEEDINGS BELOW AND FACTS NECESSARY TO ARGUMENT

Appellant, Ruel Galbreath, is a salaried teacher of horticulture employed by the School Board of Broward County, Florida (hereinafter, "the School Board"). The School Board is a party to a collective bargaining agreement with the Broward County Classroom Teachers Association, Inc. (hereinafter, "the CTA or Union"), which organization was at all times material herein certified under Chapter 447, Part II, Florida Statutes (1979), as the exclusive collective bargaining agent for a bargaining unit

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[1] References to the Appendix to Appellant's Jurisdictional Statement will hereinafter be designated as [A — page number].

comprised of all salaried instructional personnel of the School Board, including Galbreath. The agreement established the terms and conditions of employment for all bargaining unit personnel and provided a statutorily required grievance procedure which ended in binding arbitration available to all employees, irrespective of membership or nonmembership in the CTA. At all times material herein, Galbreath was not a member of the CTA [A 2, 51].

The dispute underlying Galbreath's unfair labor practice charges commenced in 1977, when Galbreath began to demand compensation in addition to his annual salary for time which he claimed to have worked attending horticulture shows and, on one or more occasions, protecting School Board property (plants) from inclement weather. His first written demand to his school principal in October, 1978, claimed that Galbreath and another horticulture teacher were entitled to approximately $4,000.00 each in accumulated overtime payments.

Despite the School Board's denial of his claims for unauthorized overtime compensation, Galbreath continued to demand payment in person and through various legal counsel until July, 1980, when he filed a formal grievance under the provisions of the collective bargaining agreement.[2] A cover letter attached to the grievance form stated that Galbreath would be represented by outside counsel in processing the grievance.

Galbreath and his legal counsel were subsequently advised that the contractual grievance procedure reserved

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[2] In the intervening period between October, 1978 and July, 1980, Galbreath claimed to have worked additional overtime and thus increased his demand for payment to approximately $4,700.00.

the right to represent employees to the CTA [A 37-38]. Galbreath then agreed, "under protest," to be represented by the CTA, but demanded that the grievance be submitted to arbitration if not granted at the initial phases of the three step grievance procedure. After the Step II hearing, the grievance was denied by the School Board as untimely and additionally on the ground that the collective bargaining agreement provided no basis for payment for overtime not authorized in advance. The CTA thereafter declined to take the grievance to Step III for arbitration based upon its conclusion that the overtime claim lacked merit. The School Board refused Galbreath's demand for individual access to arbitration because the agreement reserved the right to invoke arbitration to the CTA [A 38-39].

In March, 1981, Galbreath filed unfair labor practice charges with the Florida Public Employees Relations Commission (hereinafter, "PERC") against the School Board for denying him individual access to the arbitration procedure and against the CTA for alleged breach of its duty of fair representation.[3] The charges asserted Galbreath's conclusory "belief," without any other evidence, that the CTA had discriminatorily refused to arbitrate his grievance because he was not a union member

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[3] Galbreath alleged that the School Board violated Sections 447.501(1) (a), (b) and (f), Florida Statutes (1979) by refusing to discuss his grievance in good faith, denying him access to the grievance-arbitration procedure and generally interfering with his rights under Chapter 447, Part II, Florida Statutes (1979). The CTA was alleged to have breached its duty of fair representation and to have caused the School Board to discriminate against Galbreath based upon nonmembership in violation of Sections 447.501(2) (a) and (b), Florida Statutes (1979).

[A 33-34]. The unfair labor practice charges were summarily dismissed by PERC on the grounds that in the absence of evidence raising an inference of bad faith or arbitrary conduct, the CTA could refuse to arbitrate a nonmember's grievance because it lacked merit. The School Board was held not required by law to arbitrate with an individual employee under such circumstances.

Galbreath appealed dismissal of his unfair labor practice charges pursuant to Section 447.504, Florida Statutes (1981), to the Florida Court of Appeals, Fourth District. His primary contention was that Section 447.401 violated the "right to work" guarantees of Article I, Section 6 of the Florida Constitution (1968), because it entirely eliminated the CTA's duty of fair representation to Galbreath [A 42-43]. At the same time, he filed suit against the School Board and the CTA in the United States District Court, Southern District of Florida, pursuant to 42 U.S.C. §§ 1983 and 1985, generally alleging, *inter alia,* that Section 447.401 was violative of Article I, Section 6 of the Florida Constitution (1968), and the concurrent equal protection and due process guarantees of the United States and Florida Constitutions.[4]

Galbreath's initial brief to the Florida District Court of Appeals stated as follows, at pages 8-9:[5]

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[4] *Ruel A. Galbreath v. The Broward County Classroom Teachers Association, Inc. et al.,* Case No. 81-6403-Civ-JCP (S.D. Fla., filed July 30, 1981). The action was subsequently dismissed by "Order Granting Defendants' Motion to Abstain and Dismissing This Cause Without Prejudice," filed April 20, 1982.

[5] The School Board acknowledges that appeal of administrative agency action in Florida to a District Court of Appeal

(Continued on next page)

> Galbreath is not raising his § 1983 and § 1985 claims in this appeal and he hereby specifically reserves a right to litigate the same in Federal Court or to raise the civil rights issue in State Court at a later date, in the event the Federal Court declines to consider the same.

The Fourth District Court of Appeals affirmed dismissal of Galbreath's unfair labor practice charges, holding that the CTA had lawfully refused to submit Galbreath's grievance to arbitration and that the School Board was not obligated to allow him to individually invoke the contractual arbitration procedure where the CTA refused to do so because the claim lacked merit [A 18]. However, the court certified the following question to the Florida Supreme Court as being of great public importance:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to arbitration because the certified bargaining agent has declined to "represent" the grievant?

Galbreath's brief to the Florida Supreme Court relied primarily upon the Florida Constitution, and mentioned briefly the United States Constitution, in arguing that Section 447.401 unconstitutionally eliminated the

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constitutes a litigant's first opportunity to raise constitutional challenges because state agencies lack judicial authority to overrule a statute on constitutional grounds. *See Department of Revenue v. AMREP Corporation,* 358 So.2d 1343, 1351 (Fla. 1978); *Florida Education Association/United v. Public Employees Relations Commission,* 346 So.2d 551 (Fla. 1st DCA 1977).

CTA's duty of fair representation. The Florida Supreme Court affirmed the District Court, answering the certified question in the negative and holding that Galbreath had no absolute right to compel the CTA or the School Board to arbitrate his claim simply because he was not a union member. Both the Florida Supreme Court and the District Court adopted verbatim in their decisions pertinent quotations from a prior PERC decision, *In re Leon County School Board*, 7 FPER ¶12286 (Fla. PERC 1981),[6] which held that where a union does not invoke the Section 447.401 exception and chooses to process a grievance for a nonmember employee, it acts subject to a duty of fair representation [A 3-9; A 19-32]. At the conclusion of its opinion, the Florida Supreme Court stated without further discussion:

> We also find Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit. Accordingly, we approve the decision under review. [A 9].

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ARGUMENT AND CITATION OF AUTHORITY

This case does not fall within the appeal jurisdiction of the United States Supreme Court and is not otherwise appropriate for review by the Court.

A. Galbreath Lacks Standing To Challenge The Constitutionality Of Section 447.401, Florida Statutes (1979).

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[6] The *Leon County School Board* decision was specifically cited in PERC's summary dismissals of Galbreath's unfair labor practice charges against the CTA [A 36] and the School Board [A 40].

An appellant's standing to challenge a state statute in the United States Supreme Court is a separate issue which must be independently determined by this Court. *Cramp v. Board of Public Instruction of Orange County, Florida,* 368 U.S. 278 (1961). The uniform consequence of flawed standing has been denial of review by this Court, whether treated as a jurisdictional defect for failure to present a "case or controversy," *Warth v. Seldin,* 422 U.S. 490 (1975), or as an independent and adequate non-federal ground for the judgment below. *Cramp, supra.*

Standing sufficient to invoke the jurisdiction of this Court is not conferred by a litigant's mere abstract desire to challenge a state statute, nor is it established by allegations of wholly speculative or remotely possible benefits conceivably to be derived from a favorable decision. *Warth, supra.* The constraints imposed by Article III of the United States Constitution require a litigant to demonstrate specific, concrete facts showing personal harm directly attributable to a state enactment and additionally to show that his alleged injuries would be redressed by a decision holding the challenged provision unconstitutional.

Galbreath's claims in the case at bar fail all of the above requirements. First, he can show no injury directly or even remotely attributable to the challenged exception contained in Section 447.401, because the CTA in this case treated Galbreath's overtime claim precisely as it would have *if the exception did not exist.* It chose the option of processing his grievance, represented him as it would any union member and at all times acted subject to potential future liability in the event that it breached its

duty of fair representation. Thus, despite the existence of the exception, Galbreath was afforded precisely the same legal rights and remedies in processing his grievance as would have been available to a union member. Accordingly, a decision of this Court striking down the exception would be merely advisory because no employee, whether union or non-union, has any absolute right to take a grievance to arbitration where his or her bargaining agent makes a good faith decision not to do so because the claim lacks merit. *Vaca v. Sipes,* 386 U.S. 171 (1967).

Galbreath's complete lack of standing is further demonstrated by the fact that his claimed injuries would not be directly or even remotely remedied by a decision of this Court striking down the exception contained in Section 447.401, Florida Statutes (1979) as unconstitutional. Such a decision would confer no tangible benefit upon Galbreath, would not grant his claimed "right" to refuse union representation and to compel individual arbitration of his overtime claims and would not provide a basis for reversal of PERC's dismissal of his unfair labor practice charges. The Court would leave Galbreath as it found him and accomplish nothing more than removal of a union option which was not exercised in this case in any event. Accordingly, the appeal should be dismissed for failure to provide a justiciable "case or controversy" within the jurisdiction of this Court.

B. Galbreath's Appeal Does Not Present A Substantial Federal Question.

Galbreath lacks standing to press his abstract constitutional attack upon Section 447.401, Florida Statutes (1979). However, tangentially at least, Galbreath appears

to have mounted an ambiguous and broad-based attack upon the entire concept of exclusive representation approved by this Court in *Vaca v. Sipes, supra,* and *Abood v. Detroit Board of Education, supra.* The School Board submits that Galbreath's claim to an alleged constitutional right to individually arbitrate his grievance and his complaints regarding the allegedlly inadequate protections provided to non-union employees by traditional burdens of proof in fair representation cases have already been rejected by this Court. Accordingly, this appeal presents no true controversy worthy of further consideration and should be summarily dismissed.

C. Adequate And Independent Non-Federal Grounds Support The Florida Supreme Court's Determination That Galbreath's Constitutional Claims Lack Merit.

Galbreath's complete lack of standing to challenge Section 447.401, Florida Statutes (1979) provides a wholly adequate non-federal ground upon which the Florida Supreme Court should have dismissed his constitutional claims. *Cramp v. Board of Public Instruction of Orange County,* 368 U.S. 278, 281 (1961).

It is also possible that the Florida Supreme Court considered and dismissed the constitutional claims on their merits. Equal protection of the law was not a viable issue because Galbreath was afforded the same access to the contractual grievance procedure as was available to union members. Similarly, Galbreath received his full measure of due process of law by exercising his right to assert duty of fair representation charges against his union upon its refusal to arbitrate his grievance and by

having the disposition of such charges subjected to judicial review in the courts.

The dubious merits of Galbreath's grievance and the gross deficiencies in his unfair labor practice charges also had an unquestionable impact upon the decisions of both Florida appellate courts. The record reflects, and both courts below were aware, that Galbreath had the option of processing his overtime grievance under either the collectively bargained procedure controlled by the CTA or under the School Board's administrative, "Board Policy" procedure in which Galbreath could have been represented in a hearing before the School Board by outside counsel [Florida Supreme Court, Record on Appeal at p. 55]. Galbreath (or his legal counsel) *chose* the contractual grievance procedure with full knowledge of the limitations imposed by the CTA's authority. Accordingly, the Florida Supreme Court could well have concluded that Galbreath was estopped to claim any alleged deprivation of due process by his election of forums.

It is also relevant that Galbreath relied in his claim for unauthorized overtime upon language contained in Article VI of the 1979-82 collective bargaining agreement.[7] The provisions of Article VI concerned non-mandatory or "permissive" subjects of bargaining (*e.g.*, class size, etc.). By the terms of the agreement, disputes con-

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[7] Galbreath's Jurisdictional Statement makes reference to the following language contained in Article VI, Section F of the 1979-82 collective bargaining agreement at page 18:

> An employee in a vocational program with a teaching assignment which requires in excess of 300 minutes of student contact time per day shall be compensated for such excess assignment at the employee's hourly rate for those days when students are present.

cerning Article VI could not be submitted to an outside arbitrator but rather were to be resolved by the elected School Board members under the Step III (ALTERNATE) provision of the grievance arbitration article of the contract.[8] The question of whether Galbreath's grievance could have been submitted to an outside arbitrator *at all* was thus highly debatable. Accordingly, the record evidence—all of which was supplied by Galbreath in support of his unfair labor practice charges, provided no basis whatsoever upon which either PERC or the courts below could have sustained any presumption of bad faith or discriminatory intent against the CTA or the School Board.

Finally, it is probable that the Florida Supreme Court evaluated Galbreath's constitutional attack upon Section 447.401, Florida Statutes (1979) solely with reference to

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[8] The Step III (ALTERNATE) provision of Article III of the 1979-82 collective bargaining agreement provided in pertinent part:

> A grievance arising from the provisions of Article VI shall be subject to the grievance procedure in this Article III, except that Step III shall be as follows: If the grievant is not satisfied with the disposition of the Grievance by the Superintendent or his/her designee or if no disposition has been made within the specified time limit, the grievance may be submitted to the Board by the CTA by filing a copy of the grievance with the Board Chairperson within twenty (20) working days of the date of the disposition at Step II, or the expiration of the time limit. The Board Chairperson shall schedule a meeting on the grievance to be held within ten (10) working days of the date the grievance is received. The Board shall indicate its disposition of the grievance in writing to the CTA through the Board Chairperson within five (5) working days of the meeting. The disposition of the Board shall be final and binding and shall not be subject to court or administrative review.

his claim that the challenged exception violated the "right to work" guarantees of Article I, Section 6 of the Florida Constitution (1968). As noted *infra,* Galbreath's primary federal constitutional arguments were never briefed to the Florida Supreme Court and were first raised in oral argument or in Galbreath's motion for rehearing. A decision of the highest court of a state construing a state statute as not violative of rights guaranteed by the state constitution would not be appropriate for review by this Court. *Bowe v. Scott,* 233 U.S. 658 (1913). Accordingly, the appeal should be summarily dismissed because the decision of the Florida Supreme Court is sustainable upon adequate and independent non-federal grounds.

D. Even If Galbreath Had The Requisite Standing And Had Presented A Substantial Federal Question, Which He Has Not, The Appeal Should Be Summarily Dismissed For Failure To Properly Present And Develop The Federal Constitutional Claims Below

The School Board acknowledges that phrases such as "equal protection," "due process," "unconstitutional," and "Federal Labor Law" pervade Galbreath's unfair labor practice charges and briefs below. However, prior to oral argument and his motion for rehearing before the Florida Supreme Court, Galbreath's primary constitutional contentions centered upon alleged conflicts between Section 447.401 and Article I, Section 6 and other provisions of the Florida Constitution (1968). Galbreath specifically declined (but reserved the right) to present his federal constitutional claims to the Florida District Court of Appeals. Despite dismissal of his federal action, he did not thereafter attempt to clarify or develop his al-

leged federal constitutional claims before the Florida courts.

Galbreath's Jurisdictional Statement acknowledges in part at pages 12-14 that many of his federal constitutional arguments were first raised below at oral argument or in his motion for rehearing to the Florida Supreme Court. The terse order of that court denying the motion for rehearing gives no indication that the new constitutional arguments were considered or ruled upon, stating only that the motion "is hereby denied" [A 11].

Galbreath also relies upon his counsel's recollection of questions posited by the Justices of the Florida Supreme Court during oral argument and matters raised for the first time in his motion for rehearing in urging this Court to surmise that his federal constitutional claims *must have* been considered and rejected on the merits below [Jurisdictional Statement at pp. 12-14, 21, 25]. However, no such assumption can reasonably be made in this case based upon the wholly ambiguous state of the record and the manner in which the federal claims were presented. It is equally likely that the Florida Supreme Court either did not understand the arguments, rejected them as untimely or concluded that Galbreath lacked standing to raise them in any event.

Well established precedent of this Court based upon sound jurisdictional and practical considerations counsels against the overt speculation urged by Galbreath. The Court has uniformly required litigants seeking review before the highest court in the nation to affirmatively demonstrate that federal claims were fully developed and squarely ruled upon by the highest court of a state. *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934),

Webb v. Webb, 451 U.S. 493 (1981). Galbreath's appeal fails this test as well and should therefore be summarily dismissed.

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CONCLUSION

Galbreath's lack of standing to challenge the constitutionality of Section 447.401, Florida Statutes (1979), under either the Florida or United States Constitutions provides an adequate jurisdictional basis for summary dismissal of this appeal and also constitutes an adequate non-federal ground upon which the decision below can be sustained. The untimely and ambiguous manner in which Galbreath presented his federal constitutional claims below casts further doubt upon jurisdiction and renders review by this Court, whether by appeal or certiorari, inappropriate. The appeal should therefore be dismissed.

Respectfully submitted,

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